SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

A-934
No. 71-1294
71-1303

MRS. JOSEPH WIMBER ALPHONSE, ET AL.
Petitioners

versus

W. M. KINNER TRANSPORT CO., ET AL.

: : : : : : : : :

MARY TRICH ZWEIFEL, ET AL.
Petitioners

versus

DAVID CHARLIE PHARRIS, ET AL.
(HARTFORD ACCIDENT & INDEMNITY COMPANY)
Respondent

(CONSOLIDATED CASES)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Hartford Accident & Indemnity Company, in opposition to the petitions of Mary Trich Zweifel and Mrs. Josephine Wimber Alphonse, wife of Mr. James Alphonse, individually and for the use and benefit of her minor children,

Jill M.Alphonse and Jennifer J. Alphonse, and the major children, Judith Alphonse, James R. Alphonse and Jacquelyn M. Alphonse, for writ of certiorari to the Supreme Court of the United States, with respect, shows:

OPINIONS BELOW

The JUDGMENT of the United States District Court, Eastern District of Louisiana, Section "D", dated November 3, 1970, is not published. (The District Court opinion became "reported" when it was adopted by the Fifth Circuit Court of Appeals in its Per Curiam opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 452 F. 2d 700 (1971).

The Fifth Circuit United States Court of Appeals' opinion, denying the application for rehearing, is reported at 452 F. 2d 700 (at page 703) (1971).

QUESTIONS PRESENTED

Properly stated, Respondent submits the questions presented are:

1. Whether Texas Railroad Commission Endorsement Form No. 77 (prepared by the State of Texas) is in conflict with Texas Civil Statute Article 911(b), Section 13 vel non.

2. Whether laws enacted by the State of Texas anent the operations of a motor carrier within said State by the clear, unambiguous language of the statute, can have interstate applicability.

STATEMENT OF THE CASE

On July 31, 1968, at approximately 11:45 a.m. at or near Powhatten, Natchitoches Parish, Louisiana, a 1958 International Truck Tractor, pulling a pole trailer, loaded with poles under contract with the C. R. Knotts Company (said tractor being driven by David Charlie Pharris, an employee of W. M. Kinner, the owner of the tracton and trailer) was headed in a northbound direction on Louisiana Highway 1 when it was in a collision with a vehicle driven by Tyrell T. Manieri, which had been heading in a southbound direction on Louisiana Highway 1. Louis Zweifel and Joseph Alphonse, decedents, were occupants of the Manieri vehicle at the time of the collision, which occurred in the northbound (truck's) lane. Thereafter, upon motion, summary judgment was granted in favor of Hartford Accident & Indemnity Company, based on its denial of coverage.

At this point, respondent adopts the Fifth Circuit United States Court of Appeals opinion (which is the opinion of the District Court) which appears at Appendix A of the Alphonse petition and Appendix B of the Zweifel petition and is reported at 452 F. 2d 700.

The chronological sequence of actions taken with respect to the summary judgment are as follows:

October 30, 1970 - Summary Judgment granted after hearing, Reasons for Judgment.

November 4, 1970 - Separate Judgments signed in each case dismissing plaintiffs' claims as to Hartford Accident & Indemnity Company.

November 6, 1970 - Manieri - Petition for Rehearing.

November 10, 1970 - Alphonse - Petition for Rehearing.

November 10, 1970 - Zweifel - Petition for Rehearing.

November 18, 1970 - Hearing on Petition for Rehearing continued until December 9, 1970.

November 30, 1970 - Alphonse - Notice of Appeal filed.

December 1, 1970 - Kinner - Motion for Rehearing filed.

December 9, 1970 - Hearing on all said Petitions for Rehearing. Taken under advisement by the District Court Judge pending the filing of Summary Judgment by Millers Mutual Insurance Company (another insurance company alleged to have insurance for defendant Kinner).

December 10, 1970 - Notice of Intention to appeal filed by plaintiffs in consolidated cases pursuant to 28 USCA 1292.

December 17, 1970 - Motion for Summary Judgment filed by Millers Mutual Insurance Company.

December 17, 1970 - Order ostensibly allowing plaintiffs to appeal pursuant to 28 USCA 1292 signed by trial court judge.

January 4, 1971 - Alphonse - Notice of Appeal filed.

January 6, 1971 - Motions previously taken under submissions on December 9, 1971, now ordered denied.

November 4, 1971 - Judgment of the United States Court of Appeals Fifth Circuit.

December 13, 1971 - Judgment denying rehearing by United States Court of Appeals Fifth Circuit.

The question of jurisdiction attaching in the United States Court of Appeals, Fifth Circuit, was urged by Respondent based on the lack of a timely appeal ever having been taken. United States Court of Appeal, Fifth Circuit, by-passed the question of jurisdiction and because this brief is limited to an opposition to the Petitions for Certiorari, said argument is not repeated here. However, Respondent reserves the right to re-urge the lack of jurisdiction of this court, based on the lack of the jurisdiction of the United States Fifth Circuit Court of Appeals and does not hereby waive said argument. Respondent merely opposes here the Petitions being granted on the basis set forth by petitioners. Respondent would show this Honorable Court that there is no jurisdiction should this court act favorably upon the Petitions for Writs of Certiorari.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

Petitioners urge that the jurisdiction of this court is invoked pursuant to 28 USCA 1254 (1).

Respondent respectfully suggests that on the face of the petitions, they do not meet the "character of reason which will be considered" for granting a writ pursuant to Supreme Court Rule 19(1) (a) (b).

Petitioners urge that Endorsement 77 (a Texas Railroad Commission Form) is in conflict with Texas Civil Statute Article 911(b), Section 13.

Petitioners continue to "studiously avoid" the obvious by ignoring it. Article 911(b), Section 13, refers to "injury. . . arising out of the actual operation of such motor carris; . . ." The definition of the term "motor carrier" limits its application to "any motor propelled vehicle used . . .over any public highway in this state. . ." (emphasis supplied)

Vernon's Texas Civil Statutes Cummulative Annual Pocket Part (1970-1971, at page 32) defines motor carrier as follows:

> "Article 911(b) MOTOR CARRIERS AND REGULATION BY RAILROAD COMMISSION.
>
> DEFINITION
>
> "Section 1
>
> ". . .(g) the term "motor carrier" means any person, firm, corporation, company, co-partnership, association, or joint stock association, and their lessees, receivers, or trustees appointed by any court whatsoever owning, controlling, managing, operating, or causing to be operated any motor propelled vehicle used in transporting property for compensation or hire over any public highway IN THIS STATE,

where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed." (Emphasis added)

Acts 1965, 59th Leg., p. 572, Chapter 290, Section 1, effective May 31, 1965.

The only issues ever presented by petitioners in the trial court, in the Fifth Circuit Court of Appeal, and on rehearing before the Fifth Circuit were with regard to Texas Legislation anent motor carriers. Now, under the guise "insurance regulations" they attack the well-reasoned decisions of the District Court and the Fifth Circuit Court of Appeals. It is suggested that the only "insurance" question presented was the applicability of the Hartford Accident & Indemnity Company policy to the accident in question vel non. The other questions that have been presented by the petitioners have been with reference to motor carrier regulations by the State of Texas, which BY DEFINITION, applies only to vehicles operated IN THE STATE OF TEXAS.

The Fifth Circuit in its Per Curiam opinion on rehearing obviated the applicability of any Texas Statute applying interstate in view of the United States Congress by Federal regulations, assuming the regulation and control of motor carriers in interstate commerce.

Petitioners found solace in the words "think" and "doubt" in the Fifth Circuit's Per Curiam rehearing opinion. Petitioners "studiously avoided" the penultimate paragraph of said opinion which reads:

"We HOLD that the plaintiffs-appellants are not entitled to have the policy reformed to cover claims arising out of operations of the motor carrier beyond the boundaries of the State of Texas." (Emphasis added)

CONCLUSION

For the reasons above stated, the Petitions for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit should be denied!

Respectfully submitted,

RICHARD L. BODET
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CERTIFICATE OF SERVICE

I, RICHARD L. BODET, a member of the Bar of the United States Supreme Court, certify that a true copy of the foregoing Brief in Opposition to Petitions for Writ of Certiorari has been served on counsel for petitioners herein by depositing same in the United States mail, first class, postage prepaid, on this 9th day of May, 1972.

RICHARD L. BODET